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NORTH CAROLINA COURT OF APPEALS

IN THE MATTER OF)	
)	
MARIAH COLLINS)	
CHARLENE PENICK)	<u>From CUMBERLAND COUNTY</u>
JEREMY PENICK)	No. 02 J 264-267
RACHEL COLLINS)	
)	
)	

 BRIEF OF PETITIONER-APPELLEE THE GUARDIAN AD LITEM
 IN RESPONSE TO RESPONDENT-APPELLANT RAY COLLINS

STATEMENT OF FACTS

This case involves four children: Charlene and Jeremy Penick and Mariah and Rachel Collins. The trial court found that all four of these children had been abused and neglected by their custodial parents, Ray and Lynda Collins. Charlene and Jeremy are twins, who were 6 years of age at the time of the hearing below. Rachel Collins was 7 years old, and Mariah Collins was 1 year old. (R p. 349) Each of the parents involved in this case, Ray and Lynda Collins, has filed a separate appeal. The instant appeal was filed by Ray Collins. Because Mr. Collins is the father of only two of the four children involved in this case, this particular appeal is limited to Rachel and Mariah Collins.

Mrs. Collins was first married to Thomas Hartzel, and together they had three children: Patrick, Kevin and Sarah Hartzel. (R p. 353) During the course of this marriage, Mrs. Collins engaged in an extramarital affair with Ray Collins. This affair resulted in the birth of Rachel Collins. Id. After divorcing Mr. Hartzel, Mrs. Collins married Wilburn Penick, and together they had the twins Jeremy and Charlene Penick. Id. After divorcing Mr. Penick, Mrs. Collins married Ray Collins, and together they had their second child, Mariah Collins. Id. At the time of proceeding below, Mrs. Collins was pregnant with her eighth child. (R p. 249)

Patrick, Kevin, and Sarah Hartzel are currently in the custody of their biological father, Thomas Hartzel. (T p. 122) Prior to being placed with their father, these children had lived with Ray and Lynda Collins. (T pp. 122-23) As explained by Patrick, age 15, “I went to live with my father because there is domestic violence in the home and lots of arguments and the house was unstable, so DSS had pulled us out of the home.” Id.

The instant case involves the four children who remained in the home with Ray and Lynda Collins. At the hearing in this case, there was considerable testimony regarding inappropriate punishment, domestic violence, and general instability in the Collins’ home.

Evidence at the hearing showed that all four of the children in the home were spanked and punished frequently. (T p. 113, 158) The children were spanked so hard that they received bruises. (T pp. 115, 159) This abuse was hidden by keeping them “home from school or any place they were going.” (T pp. 115)

Rachel was spanked “a lot,” and was “tied to the bed so that she would quit squirming and get the spanking.” (T pp. 116-17) On one occasion, Rachel was spanked by Mr. Collins with a paddle so hard that he broke the paddle on her hip. (T pp. 222-23) After breaking the paddle on her, Mr. Collins told Rachel: “Go to your room, you stupid bitch.” (T p. 227)

Charlene and Jeremy were spanked with a “hand, belt, fly swatter, or paddle.” (T p. 141) Jeremy would cry when he was spanked, and he was bruised on the buttocks and legs. (T pp. 141-42) Charlene was bruised on the buttocks, legs, and the top of her back. (T p. 142)

On at least one occasion, Ray Collins spanked Mariah for crying too much when she was approximately four or five months old. (T p. 159)

The children who had been previously removed from the home were also punished harshly. Patrick was spanked with a board and other objects and received bruises. (T pp. 112-13). Kevin was spanked frequently with a leather belt and was

kept home from school because of the bruises he received when he was spanked. (T. pp. 150-57, 160). Kevin was spanked because he was blamed for putting pornography on the home computer, when Ray Collins had actually done this. Kevin was also spanked for stealing his mother's ring and camera, when again Ray Collins had actually done this. Mr. Collins spanked Kevin for these offenses that he had himself committed. Id. Kevin was also made to cut the grass around his house with scissors as punishment, as well as cleaning the bathtub with Clorox without any gloves. Id.

All of the children who are old enough to describe their feelings are glad to be away from the abuse they suffered in the Collins' home. As described by the Guardian ad Litem who was appointed in this case:

All of the children, of course except for Mariah, are happy where they are. Charlene and Jeremy are very excited to be living with their father. They said they do not want to go back, especially Jeremy. He said Ray spans a lot, he spans hard and Mommy lets him. Charlene is very happy to be there.

Rachel is happy with the Hartzels. She says she does love her parents and that she doesn't mind to see them at the visits, but she doesn't want to see them alone because that's when they hurt her.

(T p. 263)

All of the younger children in the Collins' home were scared as a result of the loud and physical fighting that took place. (T pp. 146-47) The children were also scared and upset by other inappropriate behavior by Mr. and Mrs. Collins. At the hearing below, the Guardian ad Litem was asked about her conversations with the children and any incidents that had upset them. She responded:

They just talked about how Mr. Collins would treat Mrs. Collins; that their mother would tell them to lie about things; that Mr. Collins ripped the head off one of the birds when he got upset, he would steal things and leave the house and not show up for days; and that their mom would discuss like some of her sexual things with the children, like the older children, and that the little children would be scared of her; like they would just notice how they would be in their room scared.

(T p. 262)

Ray Collins kicked the family's dogs in the presence of the children and "one time he punched the dog on the head because it wasn't listening." (T pp. 120-22) Mr. and Mrs. Collins would yell and curse at each other in front of the children. (T pp. 117, 147) At times, their fighting with the children in the house would become physical with Mrs. Collins "running around the house and Ray would push her or try to hold her down" or Mrs. Collins "would do the same thing back." (T pp. 117-118, 159) Sometimes Mr. Collins would "smack" Mrs. Collins and "one time he pushed her down off the couch." (T p. 157) One time when Mr.

Collins pushed Mrs. Collins down, she was holding the infant Mariah in her arms. (T pp. 157-58)

On one occasion, Mrs. Collins got in a particularly bad argument with Mr. Collins and locked herself in the bathroom with a knife and threatened to kill herself. (T p. 157) On another occasion, she locked herself in her room all day. Later, she explained to her children that she had been feeling sad and that she had written goodbye notes to all the children because she had been thinking about committing suicide. (T p. 119) Mrs. Collins also threatened her children that she would commit suicide if they told anyone what occurred in the home. (T p. 247) On multiple occasions, she tried to jump out of a moving vehicle in front of the children. (T pp. 119, 160)

Mrs. Collins also visited several area churches, complaining of her plight and asking for money. (T p. 188, 192-94) One local pastor had begun raising money for her until he discovered that she was receiving approximately \$3,600 per month that she had not disclosed to him. (T p. 188) Mrs. Collins has also made false claims for food stamps in the past. (T p. 258) Patrick described his mother's situation to the mother of one of his friends as follows:

He said, it's like you don't realize how bad things are until you see somebody like you and Zach, you know, how good other sons and mothers get along, he said and then you realize how bad it is. He said, I love her

because she's mom, but it's like she's crazy, but, I mean, sick – you know, he said sick in the mind . . . It was his quote. He said that she – he said it's like she can't help lying to everybody. And he said, when Zach told me she went to your church, I wanted to tell you not to give her any money because she goes to a lot of churches and asks for money. And the term he used was church pauper.

(T pp. 194-95)

Patrick also confided in his friend's mother that Mrs. Collins "would play a lot of mind games to keep them afraid, and he, in his quote, he said emotional abuse." (T p. 197)

The testimony at the hearing below also highlighted an advanced knowledge of sexual matters by Rachel Collins. While living with Mr. and Mrs. Collins, Rachel's kindergarten teacher had problems with Rachel during nap time. "She would lay on her stomach and she would put her hands in her private areas and she would move." (T p. 218) Rachel then came to live with the Hartzels when she was six years old. Ms. Hartzel described one occasion when she checked on Rachel while she was playing by herself as follows:

This one time I was checking on her, she had three female Barbie dolls, all of their clothes off, and she had a Ken doll also with its clothes off, and she was going through the rocking motion sexually on each doll going from one doll to the next.

(T p. 243)

On another occasion, Ms. Hartzel was with Rachel at a water park. She explained the incident as follows:

She actually opened up the bottom part of her bathing suit and was looking at herself. And I said Rachel, why are you doing that? Because we were like on a public beach. And she didn't say much. She said, I'm looking at myself. And I tried to talk to her to find out why. And she said, we always played a bed game at my mom and dad's house. And I said what's the bed game? And then she wouldn't say anything more about the bed game.

(T p. 244)

Finally, the Guardian ad Litem strongly encourages the Court to read the Court Report that it prepared in this case. This report appears at pages 248 – 263 of the Record on Appeal and is also set forth in the Appendix to this brief. This report sets forth additional facts regarding these children and the abuse and neglect that they suffered while in the Collins' home.

ARGUMENT

It is important to note at the outset that this case does not involve the termination of parental rights of either Ray or Lynda Collins. Such a proceeding, if it will ever be brought, is one that is still in the future. Rather, this case involves two separate proceedings that occur earlier in the process. First, the trial court held an adjudication hearing to determine whether these four children are abused or neglected. (R pp. 349-51) Because the trial court concluded that all four children

were abused and neglected, it then held a disposition hearing to determine the children's custody for an interim period and to provide the parents with directives regarding their efforts to regain custody of the children. (R pp. 352-58) The trial court's adjudication and disposition orders are set forth in the Appendix to this brief.

Following these two proceedings, which are the subject of this appeal, the trial court will engage in periodic review hearings as required by statute. See N.C. Gen. Stat. § 7B-906. The trial court will also conduct one or more permanency planning hearings to "develop a plan to achieve a safe, permanent home for [the children] within a reasonable period of time." N.C. Gen. Stat. § 7B-907. If in the coming months Mr. and Mrs. Collins have not made sufficient efforts to show that they should regain custody of their children, then one of the parties who is authorized by statute to bring a petition to terminate parental rights will likely do so. See N.C. Gen. Stat. § 7B-1100 – 7B-1112. However, as noted above, such a proceeding, if it is ever brought, is an issue for another day.

I. The Trial Court Did Not Err When it Denied the Motion of Ray Collins to Continue the Adjudication Hearing.

On January 27, 2003, at the start of the adjudication hearing, the attorney for Mr. Collins made a motion for a continuance on the grounds that Mr. Collins was not present in court because his truck had broken down. (T p. 6) The trial court

denied this motion. Id. Mr. Collins' attorney did not move for a continuance at the disposition hearing on January 28, 2003. As a result, the issue on appeal is limited to whether it was prejudicial error for the trial court to deny Mr. Collins' motion that the adjudication hearing be continued. As described below, the trial court did not err.

A. The Trial Court Did Not Abuse Its Discretion.

North Carolina's Juvenile Code sets forth the grounds on which a motion for continuance can be granted. The statute provides:

The court may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile.

N.C. Gen. Stat. § 7B-803 (emphasis added).

On appeal, a trial court's ruling on a motion to continue must be upheld unless the trial court abused its discretion. This Court recently considered a trial court's denial of a motion to continue in a termination of parental rights case. The Court explained as follows:

A motion to continue is addressed to the court's sound discretion and will not be disturbed on appeal in the absence of abuse of discretion. Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice.

In re Humphrey, 577 S.E.2d 421, 425 (2003) (quoting Doby v. Lowder, 72 N.C. App. 22, 24, 324 S.E.2d 26, 28 (1984)).

In Humphrey, the respondent-mother argued that the trial court should have granted a continuance because neither she nor her mother, who she contended was a critical witness, could attend the hearing. The Court of Appeals reasoned that the respondent-mother had “failed to meet her burden of demonstrating sufficient grounds for a continuance.” Id. at 426. As a result, the Court held that the trial court had not abused its discretion in denying the motion to continue. Id.

Similarly, in this case, Mr. Collins’ attorney offered the trial court no justification for his absence from the adjudication hearing other than “he is not able to get down here because his truck that he would use is not operational.” (T p. 6) If the inability of the respondent-mother to attend a termination of parental rights hearing in Humphrey was not sufficient grounds for a continuance, then these grounds are certainly not sufficient in this case, which did not involve termination

of Mr. Collins' parental rights, but rather the adjudication of whether these four children were abused and neglected.

This is made even more certain by this Court's recent decision in In re Mitchell M., 148 N.C. App. 483, 559 S.E.2d 237 (2002), *rev'd on other grounds*, 356 N.C. 288, 570 S.E.2d 212 (2002). In Mitchell, which also involved a termination of parental rights hearing, the respondent-mother argued that the trial court erred when it denied her motion for a continuance. The respondent-mother's motion was based, in part, on her inability "to obtain transportation to the hearing." Id. at 486, 559 S.E.2d at 239. The Court explained as follows:

[S]ince motions for continuance are generally addressed to the sound discretion of the trial court ... a denial of the motion is not an abuse of discretion where the evidence introduced on the motion for a continuance is conflicting or insufficient.... The chief consideration to be weighed in passing upon the application is whether the grant or denial of a continuance will be in furtherance of substantial justice.

Id. at 485-86, 559 S.E.2d at 239 (quoting Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976)).

With respect to the respondent-mother's lack of transportation, the Court concluded that "respondent's absence was voluntary or through her own negligence in failing to obtain adequate transportation." Id. at 487, 559 S.E.2d at

240. As a result, the Court held that the trial court did not err when it denied the respondent-mother's motion for a continuance. Id. at 487, 559 S.E.2d at 241.

Again, if a respondent-mother's failure to secure adequate transportation to attend a hearing to terminate her parental rights was not sufficient grounds for a continuance, then certainly these exact same grounds cannot be sufficient grounds for a continuance in a hearing to only adjudicate abuse and neglect.

Moreover, the trial court had no indication of when Mr. Collins would be able to appear in court. As acknowledged in Mr. Collins' brief to this Court, the trial court was aware that Mr. Collins had not been present at several nonsecure custody hearings and that he had missed an appointment with his attorney the prior week to prepare for the hearing. (T p. 6)

It is important that cases involving the custody of juveniles not be delayed unnecessarily. As explained by this Court, "child custody decisions should be made as rapidly as the dictates of fairness allow." In re Murphy, 105 N.C. App. 651, 657, 414 S.E.2d 396, 400 (1992). It had taken many months to finally arrive at the adjudication hearing, and the trial court had entered Special Session to hear the matter. (T pp. 1, 6; R pp. 58-65) Mr. Collins did not present the trial court with "extraordinary circumstances" that required a continuance. N.C. Gen. Stat. § 7B-803.

The trial court did not abuse its discretion when it denied Mr. Collins' motion for a continuance. This argument must be rejected.

B. The Adjudication Hearing Did Not Implicate Mr. Collins' Right to Due Process Under the United States Constitution.

In an effort to avoid the deferential abuse-of-discretion standard, Mr. Collins asserts on appeal that this adjudication hearing implicated his due process rights under the United States Constitution. Mr. Collins relies entirely on this Court's decision in In re Murphy, 105 N.C. App. 651, 657, 414 S.E.2d 396, 400 (1992) to support this argument. Mr. Collins' reliance on Murphy is misplaced, and this argument must fail.

Murphy involved an incarcerated father who had requested transportation so that he could be present at the hearing to terminate his parental rights. The Court concluded that a termination of parental rights proceeding did implicate the father's constitutional rights to procedural due process, which may, in some cases, require the presence of the parent whose parental rights are at issue. Id. at 653, 414 S.E.2d at 397. The Court did not conclude, however, that all termination of parental rights proceedings required the presence of the parent. Id. at 654, 414 S.E.2d at 398. In fact, in Murphy the Court concluded that the trial court had not erred by proceeding with the hearing without the father being present. Id. at 657, 414 S.E.2d at 400.

This case is vastly different than Murphy. Most importantly, this was not a termination of parental rights hearing. Rather, it was an adjudication hearing to determine abuse and neglect. The Court in Murphy concluded that constitutional protections were triggered only because the State was taking the ultimate step of permanently dissolving a parent's parental rights. Id. at 653, 414 S.E.2d at 397. In contrast, this adjudication hearing was only to determine whether these children were abused and neglected. It did nothing more than this. The adjudication hearing did not, in any way, affect Mr. Collins' rights as a parent. (R pp. 349-351) As a result, there is no basis on which to apply any heightened procedural protections that might be afforded under the Constitution.

The day after the adjudication hearing, the trial court held a separate disposition hearing to determine the temporary custody of the children. (R pp. 352-58) Mr. Collins did not make a motion for a continuance of this hearing. As a result, this appeal does not involve a question of whether such a disposition hearing would trigger any additional constitutional protections.

In any event, even following the disposition hearing the trial court had not taken any action regarding Mr. Collins' parental rights as substantial as a termination of parental rights. Rather, the trial court removed the children from Mr. Collins' custody on an interim basis and directed Mr. Collins of the steps he

needed to take so that he might be able to regain custody of these children. (R pp. 352-58) In fact, the trial court denied the State's request that it be allowed to cease reunification efforts. (T p. 307) Rather, the trial court informed the State that it was still required to pursue efforts to reunify the children with Mr. and Mrs. Collins. Id.

Because the adjudication hearing at issue in this case is vastly different than the termination of parental rights hearing at issue in Murphy, neither Murphy nor its constitutional analysis are relevant in this case. The Court should reject Mr. Collins' attempt to avoid the abuse-of-discretion standard of review that is properly applied to the trial court's denial of his motion to continue because none of Mr. Collins' constitutional rights were implicated by the adjudication hearing.

II. There Was Ample Evidence to Support the Trial Court's Findings that Rachel and Mariah Collins Were Abused and Neglected.

The trial court found that Rachel and Mariah Collins were abused and neglected on multiple grounds. For Rachel, the trial court set forth four separate grounds to support its conclusion that she was abused and neglected. (R pp. 350-51) For Mariah, the trial court set forth three separate grounds to support its conclusion that she was abused and neglected. Id.

In Mr. Collins' brief, he asserts that the evidence at the hearing was insufficient to support the trial court's findings of fact and that the findings of fact

are insufficient to support its conclusions of abuse and neglect. This argument is without merit.

As explained below, each of the trial court's findings of fact was supported by abundant testimony at the hearing. In addition, these findings of fact provide ample support for the trial court's conclusions of law.

It is important to note that because the trial court determined that there existed multiple grounds for its conclusions of abuse and neglect, any one of these grounds is sufficient to uphold the trial court's order on appeal. The trial court needed only to determine that a particular child was abused or neglected during the adjudication hearing in order for the court to then proceed to the disposition hearing. Only if the trial court had not found either abuse or neglect, would the trial court have been prevented from continuing with disposition.

This is made clear in the Juvenile Code. For example, N.C. Gen. Stat. § 7B-406 provides, in pertinent part, as follows:

(a) Immediately after a petition has been filed alleging that a juvenile is **abused, neglected, or dependent**, the clerk shall issue a summons to the parent, guardian, custodian, or caretaker . . .

(b) A summons . . . shall include:

. . .

(3) Notice that, if the court determines at the hearing that the allegations of the petition are true, the court will conduct a dispositional hearing to consider the needs of the juvenile and enter an order designed to meet those needs and the objectives of the State; and

(4) Notice that the dispositional order or a subsequent order:

a. May remove the juvenile from the custody of the parent, guardian, or custodian . . .

N.C. Gen. Stat. § 7B-406 (emphasis added).

The Juvenile Code consistently uses the disjunctive term “or,” which clearly indicates that all that is necessary for a trial court to proceed to a dispositional hearing is a determination that the juvenile is either abused, neglected, or dependent. See, e.g., N.C. Gen. Stat. § 7B-400, -401, -403, -404, -804, and -805 (all employing either the phrase “abused, neglected, or dependent” or the phrase “abuse, neglect, or dependency”) (emphasis added). In this case, the Court found multiple, independent grounds to support its conclusion that these children were both abused and neglected.

In North Carolina, there are many more reported appellate cases concerning termination of parental rights hearings than adjudication and disposition hearings. These cases have addressed this same issue in the context of hearings to terminate parental rights.

The statute governing the termination of parental rights provides, in pertinent part, as follows:

The court may terminate the parental rights upon a finding of one or more of the following:

(1) The parent has **abused or neglected** the juvenile. The juvenile shall be deemed to be **abused or neglected** if the court finds the juvenile to be an **abused** juvenile within the meaning of G.S. 7B-101 **or** a **neglected** juvenile within the meaning of G.S. 7B-101.

N.C. Gen. Stat. § 7B-1111(a) (emphasis added). Significantly, this statute incorporates the exact same definitions of abuse and neglect that are applied during the adjudication hearing.

This Court recently interpreted this statute in In re Faircloth, 153 N.C. App. 565, 571 S.E.2d 65 (2002). In Faircloth, the trial court found eight grounds for terminating the father's parental rights, but on appeal the father failed to present any argument regarding several of the grounds. As a result, the Court held that any error that could be found on appeal would not be prejudicial given the other grounds for termination that had not been argued on appeal. The Court explained as follows:

The trial court need only find one of the statutory grounds for termination. . . . Since Faircloth has failed to present argument against several of the statutory grounds for termination found by the trial court, we do not review those grounds. . . . Accordingly, even assuming

Faircloth's two remaining assignments of error have merit, any such errors are not prejudicial in this case since other substantial grounds for termination were established.

Id. at 576-77, 571 S.E.2d at 73.

As a result, in order for the trial court's order to be proper, only one of the its multiple grounds for determining that these children were abused and neglected needs to be supported by the findings of fact and the evidence. If in this appeal the Court determines that any one of these grounds of abuse and neglect is supported by the findings of fact and the evidence, then the Court need not proceed to the other grounds and the trial court's adjudication order should be upheld. See, e.g., In re Swisher, 74 N.C. App. 239, 246, 328 S.E.2d 33, 37 (1985) (explaining that "[h]aving determined that the court's order is supported by one of the grounds set forth in [the statute], we need not reach respondent's contention that the other two grounds relied upon . . . were not supported by clear, cogent, and convincing evidence.")

In fact, however, the evidence shows that each of the trial court's multiple grounds is well supported. As a result, this claim of error by Mr. Collins must fail.

A. Rachel Collins Was Abused and Neglected.

The trial court found that Rachel Collins was abused and neglected on four separate grounds:

1. Rachel was abused “in that respondents Lynda and Ray Collins inflicted or allowed to be inflicted upon [her] serious physical injury by other than accidental means;”
2. Rachel was abused “in that respondents Lynda and Ray Collins created or allowed to be created a substantial risk of serious physical injury to [her] by other than accidental means;”
3. Rachel was abused “in that respondents Lynda and Ray Collins created or allowed to be created serious emotional damage to [her];” and
4. Rachel was neglected “in that respondents Lynda and Ray Collins did not provide proper care, supervision or discipline for [her] and created an environment injurious to [her] welfare for [her] to live in.”

(R pp. 350-51)

1. Lynda and Ray Collins abused Rachel by inflicting upon her serious physical injury by other than accidental means.

This conclusion of law is well supported by the trial court’s findings of fact. The Court found as fact that “Lynda and Ray Collins imposed acts of corporal punishment on the minor children;” that “Rachel Collins would sometimes squirm or otherwise move about while the respondents Lynda or Ray Collins were spanking her;” and that “on one occasion the respondents Lynda and Ray Collins tied the minor child to the bed and proceeded to spank her.” (R p. 350)

These findings are well supported by the evidence presented to the trial court at the hearing. Rachel’s older brother, Patrick, testified that Rachel was spanked “a lot,” and was “tied to the bed so that she would quit squirming and get the

spanking.” (T pp. 116-17) Patrick also testified that he had seen all of his brothers and sisters being punished before. (T pp. 113) He testified that Rachel in particular received a lot of spankings “because she was always in trouble.” (T p. 116) Another of Rachel’s brothers, Kevin, agreed that Rachel was spanked often. He testified that of all of the children, he and Rachel were punished more than the others. (T p. 160) Patrick testified that when the spankings left bruises, the children were kept home from school or any other place they might have been going. (T p. 115)

In addition, at the disposition hearing the trial court was presented with evidence that on one occasion, Rachel was spanked by Mr. Collins with a paddle so hard that he broke the paddle on her hip. (T pp. 22-23) After breaking the paddle on her, Mr. Collins told Rachel: “Go to your room, you stupid bitch.” (T p. 227)

Tying a five year old child to a bed so that she can be spanked is abuse. Spanking a child of this age so hard that bruises are left on her is abuse. This is especially so when the bruising is so severe that the child must be kept at home to hide this abuse from others.

There was ample evidence for the trial court's findings and conclusions of abuse regarding Rachel. As a result, the Court need not proceed any farther to dispose of this meritless argument by Mr. Collins.

2. Lynda and Ray Collins abused Rachel by creating a substantial risk of serious physical injury to her by other than accidental means.

The findings and evidence cited above apply with equal force to this grounds for the trial court's conclusion of abuse. Without question, tying Rachel to a bed in order to spank her and spanking her so severely that bruises were left on her created a substantial risk of serious physical injury to this child.

3. Lynda and Ray Collins abused Rachel by creating serious emotional damage to her.

This conclusion of law is well supported by the trial court's findings of fact. The Court found as fact that "the respondents Ray and Lynda Collins engaged in acts of domestic violence in the presence of the minor children;" that "the acts of domestic violence occurred on a regular and frequent basis;" that "on two or more occasions the minor children witnessed the respondent Ray Collins chasing the respondent Lynda Collins around the house in an effort to assault her;" that "on at least one occasion the respondent Lynda Collins tried to jump out of a moving vehicle while in the presence of the minor children;" and that "the minor children

were often afraid and scared while they witnessed the acts of domestic violence.”
(R p. 350)

These findings are well supported by the evidence that was presented at the hearing. Mr. and Mrs. Collins would yell and curse at each other in front of the children. (T pp. 117, 147) At times, their fighting with the children in the house would become physical with Mrs. Collins “running around the house and Ray would push her or try to hold her down” or Mrs. Collins “would do the same thing back.” (T pp. 117-118, 159) Sometimes Mr. Collins would “smack” Mrs. Collins and “one time he pushed her down off the couch.” (T p. 157) On multiple occasions, she tried to jump out of a moving vehicle in front of the children. (T pp. 119, 160)

Patrick testified that his brothers and sisters cried a lot when Lynda and Ray Collins were living together. (T p. 146) He testified that they cried because they were scared as a result of the loud and physical fighting that took place. (T pp. 146-47) He specifically stated that Rachel was scared by the fighting. Id.

In addition, at the disposition hearing the trial court heard further evidence regarding the emotional damage to Rachel. Rachel’s kindergarten teacher as well as Ms. Hartzel testified regarding Rachel’s advanced knowledge of sexual matters and her inappropriate behavior regarding these issues. (T pp. 218, 243-44) As a

result of her time in the Collins' home, Rachel is seeing a therapist. (T p. 244) She has trouble treating the dogs in the Hartzel's home properly and is often too rough with them. (T p. 245) Rachel has also had trouble at school. As explained by Ms. Hartzel, "her biggest challenge is she does not respect others and if she does not get her way, she gets violent." (T pp. 245-46)

Accordingly, there was ample evidence and findings regarding the emotional damage to Rachel as a result of Mr. and Mrs. Collins' violent and inappropriate conduct. This is yet another separate and independent grounds on which the trial court's order was properly based.

4. Lynda and Ray Collins neglected Rachel by not providing proper care, supervision or discipline for her and by creating an environment injurious to her welfare for her to live in.

Without question, the findings and evidence cited above were ample grounds for the trial court to find that Mr. and Mrs. Collins had improperly disciplined Rachel and that they had created an environment injurious to her welfare. Tying her to bed to spank her and spanking her so severely that she was bruised is clearly improper discipline.

In fact, in their closing arguments following the adjudication hearing, both the attorney for Mr. Collins and the attorney for Mrs. Collins conceded that there was evidence of inappropriate discipline. Mr. Collins' attorney argued only that

the trial court should not find abuse; he made no argument that this case did not involve neglect. Rather, he argued, “I think it can be couched as inappropriate discipline at best.” (T p. 166) Mrs. Collins’ attorney agreed. She likewise did not argue that there was no neglect, but instead focused on the allegation of abuse. She argued, “I don’t see evidence if abuse here. I see, at best, the inappropriate discipline.” (T p. 168) This “inappropriate discipline” is, at a minimum, neglect.

“In general, treatment of a child which falls below the normative standards imposed upon parents by our society is considered neglectful.” In re Thompson, 64 N.C. App. 95, 99, 306 S.E.2d 792, 794 (1983). In Thompson, the Court concluded that although the bruises and abrasions sustained by the child in that case were not found by the trial court to have been of a serious nature, the parent’s disciplining of her five year old child showed “methods of care and discipline which are below normal standards, and therefore establish neglect.” Thompson, 64 N.C. App. at 99-100, 306 S.E.2d at 795. Likewise, the punishments rendered by Mr. and Mrs. Collins in this case fall well below the normative standards of our society and, therefore, establish neglect.

Finally, North Carolina’s Juvenile Code provides that “[i]n determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home . . . where another juvenile has been subjected to abuse or neglect by an

adult who regularly lives in the home.” N.C. Gen. Stat. § 7B-101(15). As a result, the trial court’s findings of abuse and neglect regarding the other three children at issue in this case were relevant to, and are further support of, its determination that Rachel was neglected.

B. Mariah Collins Was Abused and Neglected.

The trial court found that Mariah Collins was abused and neglected on three separate grounds:

1. Mariah was abused “in that respondents Lynda and Ray Collins created or allowed to be created a substantial risk of serious physical injury to [her] by other than accidental means;”
2. Mariah was abused “in that respondents Lynda and Ray Collins created or allowed to be created serious emotional damage to [her];” and
3. Mariah was neglected “in that respondents Lynda and Ray Collins did not provide proper care, supervision or discipline for [her] and created an environment injurious to [her] welfare for [her] to live in.”

(R pp. 350-51)

1. Lynda and Ray Collins abused Mariah by creating or allowing to be created a substantial risk of serious physical injury to her by other than accidental means.

This conclusion of law is well supported by the trial court’s findings of fact. The Court found as fact that “Lynda and Ray Collins imposed acts of corporal punishment on the minor children;” and that “on at least one occasion the minor

child Mariah Collins was being held by the respondent Lynda Collins when the respondent Ray Collins assaulted Mrs. Collins.” (R p. 350)

These findings are well supported by the evidence presented to the trial court at the hearing. Mariah’s older brother, Kevin, testified that he witnessed all of the children being punished, including the baby Mariah. (T p. 158) He further testified that Mr. Collins spanked Mariah when she was four or five months old because she was crying too much. (T p. 159) Evidence regarding the spanking received by the older children showed that Mr. and Mrs. Collins spanked their children hard, often leaving such substantial bruises on their legs, buttocks and backs that they would keep their children home from school to hide the bruises. (T pp. 115, 141-42, 159) Kevin testified that on one occasion when Mr. Collins pushed Mrs. Collins down, she was holding the Mariah in her arms. (T pp. 157-58)

Spanking a five month old baby for crying clearly presents the risk of substantial physical injury by other than accidental means and, therefore, is abuse. Assaulting a woman who is carrying a baby in her arms also presents the risk of substantial physical injury by other than accidental means and, therefore, is abuse. As a result, the Court need not proceed any farther to dispose of this meritless argument by Mr. Collins.

2. Lynda and Ray Collins abused Mariah by creating or allowing to be created serious emotional damage to her.

This conclusion of law is well supported by the trial court's findings of fact. The Court found as fact that "the respondents Ray and Lynda Collins engaged in acts of domestic violence in the presence of the minor children;" that "the acts of domestic violence occurred on a regular and frequent basis;" that "on two or more occasions the minor children witnessed the respondent Ray Collins chasing the respondent Lynda Collins around the house in an effort to assault her;" that "on at least one occasion the respondent Lynda Collins tried to jump out of a moving vehicle while in the presence of the minor children;" that "the minor children were often afraid and scared while they witnessed the acts of domestic violence;" and that "on at least one occasion the minor child Mariah Collins was being held by the respondent Lynda Collins when the respondent Ray Collins assaulted Mrs. Collins." (R p. 350)

As described above, each of these findings is well supported by the evidence that was presented at the hearing.

Accordingly, there was ample evidence and findings regarding the emotional damage to Mariah as a result of Mr. and Mrs. Collins' violent and inappropriate conduct.

3. Lynda and Ray Collins neglected Mariah by not providing proper care, supervision or discipline for her and by creating an environment injurious to her welfare for her to live in.

Without question, the findings and evidence cited above were ample grounds for the trial court to find that Mr. and Mrs. Collins had improperly disciplined Mariah and that they had created an environment injurious to her welfare. Spanking a baby for crying is clearly improper discipline. Because this treatment of a baby “falls below the normative standards imposed upon parents by our society [it] is considered neglectful.” Thompson, 64 N.C. App. at 99, 306 S.E.2d at 794. As described above, this fact was essentially conceded at the close of the hearing by the attorneys for both parents. In addition, assaulting a woman who is carrying a baby in her arms clearly creates an environment injurious to the child’s welfare. As a result, Mariah was neglected by Mr. and Mrs. Collins.

As described above, the trial court’s findings of abuse and neglect regarding the other three children at issue in the case below were relevant to, and are additional support for, the trial court’s determination that Mariah was neglected. See N.C. Gen. Stat. § 7B-101(15).

CONCLUSION

The parties in this case were fortunate to have the services of a diligent and thorough trial judge, the Honorable Edward A. Pone. Following two days of

hearings, Judge Pone had taken the matter under advisement and had instructed the parties to return to court the following morning so that he could enter his disposition order. In court the next morning, Judge Pone informed the parties that he had not yet completed his review, despite staying up until 1:00 a.m. working on the case. He informed the parties:

I intend to take the rest of the day in reviewing this matter and making the appropriate findings since it impacts not only upon the lives of these people in this court but, most importantly, the children that we're dealing with, and because of that, you who have practiced before me know that I take that very, very seriously. I will take the appropriate amount of time that it takes.

I also anticipate that unlike a lot of other cases, because of the long time that it took to arrive at this point, that the findings and decisions that are made today will most likely chart us on a course for the future destiny of these children. So it is extremely important that the findings are made with great concern and care and consideration. And I intend to do that.

I apologize to all those of you who have come back today and have taken time out of your jobs to come back and await the decision. I will render the decision in the morning at nine o'clock, and I can assure you I will spend the rest of the morning going through this and giving it the thought that it needs and resolving those issues that need to be resolved, and there will be a written order in the morning.

(T pp. 284-85)

As reflected in Judge Pone's order, the evidence in this case makes it very clear that all of the children in the custody of Mr. and Mrs. Collins were abused and neglected. Mr. Collins' arguments regarding the insufficiency of the evidence and the trial court's findings should be rejected.

In addition, the Court should reject Mr. Collins' argument that the trial court erred by denying his motion for a continuance. As supported by recent cases from this Court, the trial court was well within its discretion when it denied Mr. Collins' motion based on lack of transportation to the hearing.

The trial court's orders should be upheld in all respects.

Respectfully submitted this the 7th day of July, 2003.

NELSON MULLINS RILEY &
SCARBOROUGH, LLP

Wallace C. Hollowell, III
N.C. State Bar No. 24304
Post Office Box 30519
Raleigh, NC 27622-0519
Telephone: (919) 877-3803

ATTORNEY FOR THE GUARDIAN AD
LITEM

CERTIFICATION OF COMPLIANCE WITH RULE 28(j)

I hereby certify that the foregoing **Brief of Petitioner-Appellee the Guardian Ad Litem in Response to Respondent-Appellant Ray Collins** contains no more than the number of words allowed by Rule 28(j) of the North Carolina Rules of Appellate Procedure.

This the 7th day of July, 2003.

Wallace C. Hollowell, III

CERTIFICATE OF SERVICE

This is to certify that the undersigned has served the foregoing **Brief of Petitioner-Appellee the Guardian Ad Litem in Response to Respondent-Appellant Ray Collins** on all parties by U.S. mail to:

Carmen Battle
109 Green Street, Suite 303
Fayetteville, NC 28301

David Kennedy
1225 Ramsey Street
Fayetteville, NC 28301

Holly Stevens
5414-B Raeford Road
Fayetteville, NC 28314

Rebekah Davis
111 Brooks Avenue, Suite 1
Raleigh, NC 27607

Robin Hurmence
1017 Arsenal Avenue
Fayetteville, NC 28305

Peter Wood
P.O. Box 3035
Raleigh, NC 27602

This the 7th day of July, 2003.

Wallace C. Hollowell, III

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